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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 270

THE PRUDENCE COMPANY, INC.,

Petitioner,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND AND AMERICAN BONDING COMPANY OF BALTIMORE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALFRED T. DAVISON,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

The Prudence Company, Inc., petitioner, by Alfred T. Davison attorney and counsel, prays that a Writ of Certiorari issue to review the decree (R. 885) of the United States Circuit Court of Appeals for the Second Circuit, made in the above entitled case on June 17, 1935, which decree reverses the judgment (R. 61) of the United States District Court for the Southern District of New York, entered June 14, 1934, in favor of petitioner, as plaintiff, against Fidelity & Deposit Company of Maryland and American Bonding Company of Baltimore, as defendants, for $781,694.56, and which decree also orders a new trial.

Opinions Below.

The opinion of the District Court (R. p. 498) is reported in 7 F. Supp. 392.

The opinion of the Circuit Court of Appeals is not yet reported, but is printed in the record (R. 877).

Jurisdiction.

The decision of the Circuit Court of Appeals was rendered June 10, 1935, and the order for the mandate* thereon was entered June 17, 1935.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28 Sec. 347).

The fact that the case was remanded for a new trial does not prevent the issuance of a Writ of Certiorari at this time rather than awaiting the outcome of a new trial, which new trial the application for this writ seeks to make unnecessary.

United States v. *Gulf Refining Company*, 268 U. S. 542, 545;

Stringfellow v. *Atlantic Coast Line R. Co.*, 290 U. S. 322.

Questions Presented.

1. Whether the measure of damages sustained by a mortgagee, as obligee under a surety bond, which (1) guarantees the completion on a certain date of the building to be mortgaged as security for the building loan, and (2) agrees to fully indemnify the obligee, in case of breach of such bond, includes interest lost (on the amount advanced under the

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* The issuance of the mandate of the Circuit Court of Appeals has been stayed by that Court pending the consideration and decision of this petition for writ of certiorari.

building loan agreement) between the date on which the building (under the guaranty and indemnity bond) should have been completed and the date on which it was actually completed.

2. Whether such measure of damages under the guaranty and indemnity bond above mentioned includes, in case of such breach, taxes and insurance premiums which the mortgagee (obligee under the bond) was required to, and did, pay during its completion of the building.

3. Whether the Circuit Court of Appeals has correctly interpreted the decision of this Court in *Trainor* v. *Aetna Casualty Co.*, 290 U. S. 47, and the decision of the New York Court of Appeals in *Kidd* v. *McCormick*, 83 N. Y. 391, with respect to the measure of damages of a mortgagee, as obligee under the guaranty and indemnity bond above mentioned.

4. Whether the following provision, contained in such guaranty and indemnity bond (given by the defendants below as sureties to the obligee)

> "Any waiver or release by the Obligee of any default or omission by the Principal and/or Surety in complying with said building loan agreement or plans and specifications or with the provisions of this bond, must be in writing and signed by the duly authorized officers of the Obligee in order to be binding upon the Obligee, and any such waiver or release shall apply only to the item or items specifically so released."

is or may be waived by conversation between an officer of the obligee and a person who does not represent either the principal or the surety companies.

5. If the foregoing provision quoted in "4" above can be orally waived, then whether a conversation between the

former architect of the principal (but at that time representing neither the sureties nor the principal) and an officer of the obligee, with respect to unspecified variations which had been made from the plans and specifications embodied in the building and loan agreement, is evidence tending to show that such obligee

(1) had consented to variations included in the damages sought in this action;

(2) had effectually waived the provision of the bond quoted in "4" above; and

(3) can deprive the obligee of its rights to indemnity for variations not consented to, waived or released in accordance with the provision of the surety bond quoted in "4" above.

The above questions and points were raised and argued by all parties and considered by the Circuit Court of Appeals.

Statement of Facts.

This is an action at law by petitioner (plaintiff in the District Court, and hereinafter referred to as "Prudence Company"), as obligee, under a guaranty and indemnity bond for $3,000,000 given by defendants (Fidelity & Deposit Company of Maryland and American Bonding Company of Baltimore, and hereinafter referred to as "sureties"), in order to induce Prudence Company to advance as a building loan $6,650,000 to Central Park Properties, Inc. (hereinafter referred to as "principal") for the construction of, and to be secured by, mortgage on an apartment hotel (the largest apartment hotel in New York, now known as "Essex House").

Said surety bond:

1. Guaranteed the construction and completion *not later than December 16, 1930* of *the* (not *a*) modern 40-story and basement fire-proof hotel, specifically described and identified (R. p. 595) in "*strict* accordance" with the building loan agreement and with the plans and specifications, therein referred to and definitely identified by the parties, so as to be (not later than said December 16, 1930) *ready for occupancy as a modern hotel* (furniture only excluded).

2. Obligated the surety companies to "*fully indemnify*" Prudence Company "against any and all loss or damage by reason of failure of the Principal to * * * complete said building * * * within the time aforesaid" and in accordance with the plans and specifications (R. p. 596), and also "to make good any and every default on the part of the principal" in performing any of the terms, covenants and conditions which the principal had agreed to keep and perform in the building loan agreement up to and including the completion of and payment for said building (R. p. 596).

3. Provided that *any waiver or release* by Prudence Company of any default or omission by principal and/or surety in complying with the building loan agreement or plans and specifications *must, in order to be binding upon Prudence Company, be* (1) *in writing, and* (2) *signed by duly authorized officers of Prudence Company,* and (3) *specify* "the item or items so specifically released" (R. p. 604).

4. Provided that upon default by principal and/or sureties, Prudence Company may

(1) complete in general accordance with building loan agreement and plans and specifications (R. p. 602); and

(2) "do all other acts and things deemed necessary or proper by the obligee" (Prudence Company) "to complete and equip said building" (R. p. 602).

The bond then goes on to provide (R., p. 602) that the sureties shall repay Prudence Company "any and all sums of money paid by the obligee" (Prudence Company) "for the purposes" just enumerated "with interest."

The full amount of the building loan was advanced in accordance with the building loan agreement, and $75,000 on account thereof was paid, leaving as the total amount of the mortgage loan advanced $6,575,000.

Defaults under the bond are conceded.

Concededly,

(1) the building was not completed and ready for occupancy on December 16, 1930;

(2) the building was not constructed in accordance with the plans and specifications and the building loan agreement; and

(3) large amounts of money remained to be expended to bring the building up to the mark of the contract.

The word "concededly" is used advisedly.

We need refer only to the verified answers (R., pp. 39, 50, 51), marked in evidence at the trial (R., pp. 249-50) and to the statements of defendants' counsel upon the trial (R., p. 334).

The District Court's findings of fact with respect to such defaults were not questioned by the Circuit Court of Appeals.

The Prudence Company completed the building after notices to the surety companies, giving opportunity to them to complete, and after their failure to do so.

During the course of such completion, Prudence Company expended large sums of money for labor and materials and also for taxes and insurance premiums on this building.

There were also substantial departures from the plans and specifications, which The Prudence Company, in accordance with its rights under the bond (R., pp. 602-03) did not go to the expense of remedying—omissions of items called for, and substitutions of materials inferior to those called for by the plans and specifications.

Authority to pass on requests for permission to change specific items in the plans and specifications was vested in a Committee of plaintiff's staff, of which committee the Vice-President in charge of this loan, Mr. Braislin, was a member (R., p. 117). The principal knew of this Committee (R., pp. 136-7), and it was referred to in correspondence concerning various requested changes (Plaintiff's Exhibits 12 and 13, R., pp. 684-5).

Certain requested changes in the plans and specifications had been permitted, and in each case approved in writing. No claim is made for damages on account of such permitted changes. Other omissions of items called for by the plans and specifications and substitutions of inferior materials took place, however, without the permission or knowledge of the plaintiff, as is established by the evidence and by the verdict directed by the Trial Court.

There was no evidence offered to show that any officer other than the Committee, even the President, had authority to waive or consent to changes; yet one of the grounds of reversal relied on by the Circuit Court of Appeals was the sustaining of plaintiff's objection to a question put to Mr. Grad, the former architect of the principal, with reference to a conversation had with the President of plaintiff, in connection with another loan, as follows:

> "Q. And didn't you tell him" (meaning the President of the plaintiff) "at that time about certain things which in your opinion were not in accordance with the plans and specifications"?

The case was tried, pursuant to written stipulation (R., p. 65), before a jury of one, and both parties agreed that they should be deemed, at the conclusion of the trial, to have moved for a directed verdict without reservation of any right to have any issue or issues submitted to the jury.

Pursuant to such stipulation, the Court, after trial consuming 7 court days, directed a verdict in favor of plaintiff for $777,934.54 (R., p. 516) which, with interest from the date of the verdict to the date of the entry of the judgment, made up the amount of the judgment entered June 14, 1934, namely, $781,694.56 (R., p. 61).

Such judgment includes three types of damages to the plaintiff (R., pp. 515-16, 63), viz.:

I.	Amount expended by plaintiff in the completion of the building (including insurance premiums in the sum of $1,640.87 and taxes in the sum of $57,120)	$209,454.85	
	Interest thereon to May 15, 1934	33,765.93	$243,220.78
II.	Amount representing estimated cost of supplying omissions of materials called for by plans and specifications and difference in value of inferior materials substituted for items called for by plans and specifications	$143,842.28	
	Interest thereon from December 16, 1930, to May 15, 1934	29,426.76	173,269.04

III. Amount of interest lost by plaintiff by reason of failure to complete on or before December 16, 1930, being interest on $6,575,000—net amount advanced on building loan mortgage—from December 16, 1930, to date of completion, October 1, 1931 (as alleged in subdivision XXXVII (3) of the complaint)	$312,357.53	
Interest thereon from October 1, 1931, to May 15, 1934	49,087.19	361,444.72
Total amount of verdict		$777,934.54
Interest thereon from May 15, 1934 (date of direction of verdict) to June 14, 1934 (date of entry of judgment on the verdict)		3,760.02
Total amount of judgment		$781,694.56

All defenses set up by the defendants were either stricken out by the District Court on motions before trial (See opinion of Judge Bondy, R., p. 523—2 F. Supp. 454—) or were held not proved at the trial (See opinion of Trial Court—Judge Galston—R., p. 498), and the Circuit Court of Appeals was in accord with such dispositions thereof, except only with respect to one aspect of the partial defense of waiver, which is one of the questions presented on this application.

The decision of the Circuit Court of Appeals, reversing the judgment and ordering a new trial, is upon the following grounds:

1. That the measure of damages on the breach of this bond of guaranty of completion and also of indemnity does not permit the recovery of interest which the Prudence

Company lost on the money it had actually advanced on the mortgage loan on the building (which was not completed) between the date the building should have been completed (December 16, 1930) and the date of actual completion by the Prudence Company (October 1, 1931).

2. That the measure of damages on the breach of this bond of guaranty of completion and indemnity does not permit the recovery of taxes ($57,120) and insurance premiums ($1,640.87), which Prudence Company was required to pay for the period between the date the building should have been completed and the date it was completed.

3. The exclusion of evidence, "tending to show" parole waiver or release of requirements of building loan agreement and plans and specifications, was prejudicial error.

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:

I.

With respect to the items of interest, taxes and insurance.

1. In holding that none of the items of interest, taxes and insurance, for the period between the date fixed for completion of the building and the date of actual completion, was recoverable under the applicable rule of measure of damages.

2. In holding that interest lost on the loan and taxes and insurance paid, for the period between the date fixed for completion of the building and the date of actual completion, were not within the contemplation of the parties at the time of the execution and delivery of the surety bond.

3. In holding that there is no evidence to support the finding of fact by the Trial Court that interest, taxes and

insurance were each within the contemplation of the parties.

4. In holding that, in the absence of express contract to pay the interest lost on the mortgage loan, interest as damages, even though within the contemplation of the parties, cannot be recovered under the surety bond and that there was no evidence to support the District Court's finding on this point.

5. In holding that there is no condition, express or implied, in the surety bond, respecting payment of interest on the loan, taxes or insurance, and that no liability exists therefor, and that none of them are within the undertaking of the surety companies.

6. In holding that, under the decision of the Court of Appeals of the State of New York in *Kidd* v. *McCormick*, 83 N. Y. 391, and the decision of this Court in *Trainor* v. *Aetna Casualty Co.*, 290 U. S. 47, interest, taxes and insurance are not recoverable as damages on the breach of the surety bond.

7. In holding that the true measure of damages to the Prudence Company is the extent to which its security was impaired by the failure to complete the building in accordance with the plans and specifications.

8. In holding that any Court can pass upon the margin or nature of security to which the Prudence Company is entitled under the building loan agreement and surety bond in this case.

9. In holding that the Prudence Company was not entitled on December 16, 1930, to a completed building, which could be immediately rented and availed of as a source of income, out of which to pay interest, taxes and insurance.

10. In holding that the Prudence Company cannot recover interest as damages by reason of the failure to complete said building on December 16, 1930, in the absence of proof showing loss of rent during the period of incompletion.

11. In holding that the parties did not contemplate at the time of the building loan agreement that the building would rent and was capable of being rented for more than enough to pay interest, taxes and carrying charges.

12. In holding that interest, taxes and insurance should not be included as damages under a rule of measure of damages based upon the difference of the value of the building on December 16, 1930, as the work had progressed, and the value it would have had on that day, if completed strictly in accordance with the plans and specifications.

II.

With respect to the alleged evidence of waiver.

13. In holding that any evidence was offered which in any way tended to show that the Prudence Company or President of the Prudence Company consented to any substitutions by the principal of materials inferior to those called for by the plans and specifications.

14. In holding that there could be any parole waiver of the requirement of the bond that no waiver or release of default or omission was to be valid, unless in writing signed by duly authorized officers and restricted to the item or items specifically waived or released.

15. In holding that the requirement of the surety bond last above mentioned could be waived by oral statements between any officer of the Prudence Company and a person who, at the time of such oral statements, was not an officer

of and did not represent any of the parties to the surety bond.

16. In holding that the President of the Prudence Company had or purported to have any authority to waive the provisions of the building loan agreement and plans and specifications or the requirement of the bond with respect to written waiver.

17. In holding that the exclusion of the evidence relied upon by the Circuit Court of Appeals was error prejudicial to the surety companies.

18. In holding that substitutions or changes could be effectively consented to, waived or released by Prudence Company without a writing signed by duly authorized officers and specifying the items so released.

III.

With respect to the ordering of a new trial.

19. In ordering a new trial of the case, rather than (assuming for the purpose of argument that there was any error with respect to the measure of damages) modifying, and affirming as modified, the judgment of the District Court.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has rendered a decision in conflict with the decision of this Court in *Trainor* v. *Aetna Casualty Co.*, 290 U. S. 47.

Clearly, as we submit, this Court has ruled that interest, taxes and insurance are within the damages contemplated by parties to such a surety bond as is the subject of this action.

Whereas in *Trainor* v. *Aetna Casualty Co., supra,* this Court held, with respect to the measure of damages of a

plaintiff mortgagee on the breach of a bond guaranteeing completion of certain buildings and improvements,* as follows:

> "* * * In the meantime, the uncompleted buildings necessarily lay unrented, subject to expense in the way of *taxes, insurance, accumulating interest, etc.*, deteriorating in quality and steadily declining in value. *Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking;* * * *." (Italics ours.)

nevertheless the Circuit Court of Appeals has disregarded the plain implication of that decision and thereby created confusion in the law.

Aside from the contemplation of the parties (and as argued in more detail in the brief in support hereof), the difference in value between the building as it was on December 16, 1930 and as it should have been under the building loan agreement and plans and specifications necessarily involves what a willing buyer would pay and a willing seller would take; certainly a willing buyer would necessarily be required to deduct from any amount which he otherwise would pay for this property on December 16, 1930, interest (pending completion of the building) on the purchase price, plus the cost of completion and also taxes and insurance during completion.

2. The Circuit Court of Appeals has decided an important question of law affecting a contract made and to be performed in the State of New York in a way in conflict with the applicable decision of the Court of Appeals of the State of New York.

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*The bond in the instant case both guarantees completion and also provides for full indemnity to the Prudence Company.

In *Kidd* v. *McCormick*, 83 N. Y. 391 (which case this Court cited with approval in *Trainor* v. *Aetna*), the New York Court of Appeals establishes not only that interest is recoverable as an item of damage, but also that it is clearly within the contemplation in such situations as here presented. In that case, plaintiff conveyed the property to the defendants, taking back purchase money mortgages which he subordinated to first mortgages. In order to induce the plaintiff to so subordinate, it was agreed that a special fund should be provided to be paid to the plaintiff when the buildings were completed and ready for occupancy. Defendants defaulted in completing and the question was raised concerning the rights of the plaintiff as said second mortgagee in such special fund so deposited for the completion of the buildings.

In affirming judgment in favor of the plaintiff (second mortgagee), the New York Court of Appeals said (p. 395):

> "* * * Clearly he" (plaintiff, second mortgagee) "is entitled to have from the McCormicks as much as will put him in as good plight as he would have been had the houses been finished."

and at page 398:

> "The plaintiff was entitled on the 1st of September, 1877, that there should be finished houses, rentable, and so, *productive of income with which to keep down interest on the mortgages on the lots, the taxes thereon, and insurance premiums.* He could not, on that day, had he been let into immediate possession and control, by any expenditure of money or energy, have completed them at once; nor, in the nature of things, could he have supplied the lack of the completed houses by a purchase in the market. *The work needed to complete was one of time; and while the time was running, interest was running also, taxes were levied, insurance was to be kept up, and the premises were yielding no rent.*

> *It is plain that to repay him just what he expended to finish the buildings would not make him whole; for he had to pay, besides the cost of building, interest to Granniss,"* (first mortgagee) *"and lose interest on his own mortgages, and pay taxes and premiums."*

In *Kidd* v. *McCormick* there was no bond with the many and specific obligations which are in the bond in this case. We have, however, called attention to what the Court said in that case because it indicates what subsequent to that case must have been plain to sureties binding that same relationship.

While the Circuit Court of Appeals professed to follow the decision of the New York Court of Appeals in *Kidd* v. *McCormick, supra,* it has, nevertheless, held that interest, taxes and insurance cannot be recovered in a case such as this.

3. Ever since *Hadley* v. *Baxendale,* 9 Exch. 341, 354, 356 (1854) the law has been well settled and unquestioned that damages on breach of contract

> "should be * * * such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

(See *Howard* v. *Stillwell & Bierce Mfg Co.,* 139 U. S. 199, 207, approving *Hadley* v. *Baxendale, supra.)*

The decision of the Circuit Court of Appeals in this case is in conflict with the rule or measure of damages as laid down in *Hadley* v. *Baxendale* and subsequent cases.

4. The Circuit Court of Appeals is a Court of last resort in a great majority of the cases coming before it. If, as we submit, the Circuit Court of Appeals has misapplied the law as laid down by this Court in *Trainor* v. *Aetna Casualty*

Co., and by the New York Court of Appeals in *Kidd* v. *McCormick*, such decision should not be permitted to stand. The substantive law with respect to surety and assured will be made more definite and consistent by this Court passing upon the questions here presented.

5. Both parties in this case asked the Court to direct a verdict and, therefore, the Circuit Court of Appeals, in reviewing the action of the Trial Court, was limited to the consideration of the correctness of the finding of law and was required to affirm, if there was any evidence in support thereof.

Beutell v. *Magone*, 157 U. S. 154;
Lehnen v. *Dickson*, 148 U. S. 71;
Runkle v. *Burnham*, 153 U. S. 216.

In order to reverse on the ground that interest, taxes and insurance were improperly included in the judgment, the Circuit Court of Appeals, in effect, held that there was no evidence supporting the finding of fact by the Trial Court that these items were within the contemplation of the parties.

Such a holding is palpable error, calling for the supervisory jurisdiction of this Court.

6. This case involves an important question of law of general importance, concerning which the decision of the Circuit Court of Appeals is both uncertain and unsatisfactory.

It is respectfully submitted that all question of uniformity of decision, with respect to the recovery of interest, taxes and insurance on a bond such as this, should be definitely settled. A correct and definite determination of the liabilities on such bonds is of importance to builders and lenders throughout the country, not only on bonds now in force, but also on all which may be written.

Especially is the question involved in this case of importance and in the public interest, because the Prudence Company, an investment corporation under the Banking Law of the State of New York, made and holds its investments for the benefit and protection of a large number of investors, whose interests are vitally affected by reason of the loss of interest, taxes and insurance in this case.

The Prudence Company agreed to make this loan on the condition of this $3,000,000 bond being executed and delivered. The various committees of creditors and stockholders of the Produence Company, now in re-organization under Section 77-B of the Bankruptcy Law, as well as the Reconstruction Finance Corporation, which has loaned $20,000,000 to the Prudence Company, are vitally interested in this case and the correct decision of the questions of law in connection therewith.

7. The obligees under surety bonds throughout the entire United States are vitally interested in the question of whether any protection to the obligee is afforded by a provision in a surety bond, whereby no claim can be made that the obligee has consented to variations, substitutions, changes or omissions by the principal, unless duly authorized officers of the obligee specifically consent thereto in writing.

In order to protect themselves against a claim of oral waiver of provisions of the building loan agreement and plans and specifications, the directors and officers of the Prudence Company (which had agreed to make building loans on 120 separate buildings then being erected) required the insertion in the surety bond in this case of the above mentioned provision.

By the decision of the Circuit Court of Appeals in this case, the action of the directors and the committee which

passes upon loans is to be rendered nugatory by oral evidence of casual conversations with an officer of the plaintiff who was not a member of the committee constituted for the purpose of passing upon requested variations from the plans and specifications.

8. The question of oral evidence of waiver or consent to substitutions or omissions is left indefinite and uncertain in this case.

Under the decision of the Circuit Court of Appeals, if the trier of fact finds that any officer of the Prudence Company had authority to waive and obtained information from any source as to violations of the plans and specifications, the trier of fact may base a finding thereon that the Prudence Company itself has waived or consented to such violation, notwithstanding the protection which the directors of Prudence Company thought they had bargained for with the surety companies by having inserted in the bond the provision restricting waivers in the language above quoted, and notwithstanding the reliance of such directors on such provision in the bond guaranteeing the construction and completion of this forty-story building in all its details.

Certainly, the holding of the Circuit Court of Appeals which permits the elimination of this provision from the bond and thus permits upon oral evidence variations in the details of construction is of such importance in the law of contracts as to require an authoritative decision by this Court. Especially is this so when the oral evidence in this case, seeking to modify *the surety bond,* was by a person not connected with either sureties or with the principal.

9. The trial of this case consumed seven actual court days, in addition to the time required for preparation, briefs and consideration by the Court itself.

Due to the amount of the bond ($3,000,000) and the peculiar gravity of the case, if there is to be a new trial, such new trial should not be had until this Court has definitely passed, first, upon the necessity therefor, secondly, upon the items of damages applicable upon such new trial, if it be necessary.

WHEREFORE, your petitioner respectfully requests that a Writ of Certiorari should be granted, as prayed for.

Dated, July 22, 1935.

THE PRUDENCE COMPANY, INC.,
By ALFRED T. DAVISON,
Attorney and Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Reference to the opinions of the Court below, and the grounds of jurisdiction, as well as a statement of the case, and specifications of error to be urged, are contained in the Petition.

Summary of Argument.

I.

The Applicable Decisions of the Supreme Court and the New York Court of Appeals Justify and Require the Allowance of Interest, Taxes and Insurance as Part of the Damages Caused by the Failure to Complete the Building at the Time Guaranteed.

The items of interest, taxes and insurance inevitably and properly enter into the determination of difference in values between the building contracted for and the building at the time when it should have been completed.

II.

The Provisions of the Surety Bond in This Case Specifically Obligated the Surety to Pay Interest on the Loan, and Taxes and Insurance on the Mortgaged Property, Until the Date of Actual Completion of the Building in Accordance With the Plans and Specifications.

III.

Aside from the Express Provisions of the Bond Requiring Payment of Interest, Taxes and Insurance, Their Recovery as Damages Involves a Question of Fact as to What Was Contemplated by the Parties: and This Fact, Supported by Evidence and Found by the District Court, Was Not Open to Review by the Circuit Court of Appeals.

The question of what damages were contemplated by the parties at the time the contract was made is a question of fact.

IV.

Even Assuming, for the Purpose of Argument, That the Contract in This Case (the Surety Bond) Could be Orally Changed by the Parties Thereto, Nevertheless the Circuit Court of Appeals Has Confused the Contract Which It Says Was Changed.

There Is No Pretense in the Record That the Parties to the Surety Bond Ever Undertook or Attempted to Change the Provisions of the Surety Bond.

V.

The Evidence, the Exclusion of Which Was Made a Basis of Reversal by the Circuit Court of Appeals, Did Not "Tend to Show" Any Waiver of the Plans and Specifications or Consent to Substitutions.

Moreover, there was not even any evidence offered in this case that the President purported to waive anything.

Conclusion.

ARGUMENT.

I.

The Applicable Decisions of the Supreme Court and the New York Court of Appeals Justify and Require the Allowance of Interest, Taxes and Insurance as Part of the Damages Caused by the Failure to Complete the Building at the Time Guaranteed.

The controlling decisions, cited by the District Court in support of its decision (R. pp. 506-07), discussed in the briefs of both parties before the Circuit Court of Appeals, and in turn relied upon by the Circuit Court of Appeals

without explanation, as a basis for its reversal of the District Court's decision, are *Trainor* v. *Aetna Casualty Company*, (290 U. S. 47-1933) decided by this Court and *Kidd* v. *McCormick* (83 N. Y. 391-1881), decided by the New York Court of Appeals, both of which have already been referred to in the petition (*supra*, pages 13-17).

The Circuit Court of Appeals failed to cite or consider the pertinent portions of those cases.

Kidd v. *McCormick* clearly recognizes that part of the damages which a mortgagee suffers by reason of failure to complete a building on the date called for, are the loss of interest during the period of completion, and the taxes and insurance premiums which must be paid pending completion—during the period that is, while, because of the principal's default, it is impossible to produce any income to keep down such carrying charges. No court has ever questioned the language or the justice of the statement of Chief Judge Folger in that case (83 N. Y. 398):

> "It is plain that to repay him just what he expended to finish the buildings would not make him whole.".

See also the portion quoted in the petition *supra* at pages 15-16. Equally plainly, such reference to interest, taxes and insurance premiums as part of the mortgagee's damages in that case, was not mere dictum. In fact, in *Kidd* v. *McCormick* the items of damage by reason of loss of interest and accruing taxes and insurance were included as one of the very grounds urged in support of the judgment in the plaintiff's brief to the Court of Appeals (p. 6 of brief).

When this Court in *Trainor Company* v. *Aetna Casualty Company* approved *Kidd* v. *McCormick*, and referred in similar language to the fact that pending completion "the uncompleted buildings necessarily lay unrented, subject to expense in the way of taxes, insurance, accumulating interest, etc." (290 U. S. at 55), it certainly approved the inclusion of such items in the measure of damage, and this Court

recognized that "to repay him just what he expended to finish the buildings would not make him whole."

The Circuit Court of Appeals, by disregarding, without discussion, such specific language, has not only misconstrued a decision of this Court, and denied relief on a New York contract to which plaintiff was entitled under the law of New York, but has necessarily created confusion and uncertainty as to the true rule of damages, which calls for the supervisory action of this Court.

> The items of interest, taxes and insurance inevitably and properly enter into the determination of difference in values between the building contracted for and the building at the time *when it should have been completed.*

There is no inconsistency between the rule that the measure of damages is the difference in value and the claim to include lost interest and taxes and insurance premiums as part of the damages under a bond guaranteeing completion at a certain date and indemnifying against loss by reason of non-completion. On the contrary, the two ideas are perfectly consistent. As the Court of Appeals stated in *Kidd* v. *McCormick,* the mere out-of-pocket expense of completion did not make allowance for the loss of interest, taxes and insurance during the period of completion and would not make the obligee (mortgagee) whole. There is no conceivable way of valuing an incompleted building without considering the fact that in order to complete it, time will be necessary and that during that time, interest on the investment will be lost or must be paid and taxes and insurance must also be paid.

In order to understand how clearly the New York Court of Appeals has expressed itself on this question, and how accurately the plaintiff followed its rules, it is necessary to quote again *Kidd* v. *McCormick* (83 N. Y. at 397):

> *"Stated in its broadest form, the plaintiff is to have that compensation, which will leave him as well off as*

he would have been had the contract been fully performed. With more particularity, he has a right to a house as good as that which the defendants agreed to furnish; and his damages is the difference between the value of the house furnished and the house as it ought to have been furnished. One kind of testimony by which that difference may be made known, is that of experts, saying what would have been the value of the one, and what is the value of the other. Another kind of testimony is that of experts, what it would cost to complete the unfinished house up to the mark of the contract. Another kind is, when the house has been in fact finished, up to that mark, what it did in fact cost to finish it. But these ways all lead to the same end; what is the difference in value between the unfinished house and a house had it been finished as agreed upon. And this is to be observed of the last-named kind of testimony; *first*, that the plaintiff is not under obligation to go on and finish the house; *second*, that *he cannot always finish it, as he could not in the case in hand, at the day called for by the contract, when there will come into the damages the element spoken of by Marvin, J., in* 33 *N. Y.** (*supra*) *of loss from delays;*"

That is, as the Circuit Court of Appeals stated, there are three kinds of testimony as to difference in value:

(1) Experts as to the difference in value;

(2) experts as to the cost of completion; and

(3) actual cost of completion.

As to the items of omission and substitution which the plaintiff did not in fact supply, it introduced testimony as to what it would have cost "to complete the unfinished house up to the mark of the contract".

As to the work of completion which the plaintiff in fact undertook and carried through, it introduced testimony of "what it did in fact cost to finish it".

Morrell v. Irving Fire Insurance Co. 33 N. Y. 429.

Bearing in mind what the Court of Appeals had said of this third type of testimony, that "he cannot always finish it * * * at the day called for by the contract when there will come into the damages the elements * * * of loss from delays", the plaintiff introduced evidence as to what constituted the loss from delay; and used the minimum figures, properly applicable to a mortgagee of lost interest, taxes, and insurance premiums. An owner may be entitled to recover the entire rental value of the premises as damages for delay in completing, but it does not follow that a mortgagee is entitled to the same measure of damages, which might give him a profit over and above his rights under the mortgage.

The Circuit Court of Appeals seems to have proceeded on the notion of a theoretical absolute value of the building independent of the time element, and to have disregarded the fact that the building loan agreement and the bond called for a completion of the building on or before December 16, 1930. In doing so they have likewise disregarded the law of New York as stated in the *Kidd* case, that damages from delay, in the nature of "interest on mortgages on the lots, the taxes thereon, and insurance premiums" (83 N. Y. at 398) must be considered in fixing the value of what has been lost.

II.

The Provisions of the Surety Bond in This Case Specifically Obligated the Surety to Pay Interest on the Loan, and Taxes and Insurance on the Mortgaged Property, Until the Date of Actual Completion of the Building in Accordance With the Plans and Specifications.

The statement of the Circuit Court of Appeals (R. 884) that "there is no condition, express or implied, respecting payment of the principal or the interest on the loan, taxes

or insurance'' flagrantly disregards the provisions of the bond in this case, and prejudices the interests of all lenders, whether individual, corporate or governmental, who have made loans on the basis of similar bonds.

Included in the obligations of the defendants contained in the surety bond is the following:

> '', and shall *make good* any and every other *default by the Principal in performing* any of the other terms, *covenants* or conditions in said *building loan agreement* set forth by the Principal to be kept and performed *up to and including the completion of and payment for said building* and installation of and payment for said equipment * * * within the time aforesaid'' (R., p. 596-97).

The surety bond makes the building loan agreement and all and singular the terms thereof, a part of the Surety Bond (R. p. 592-93) and in such surety bond the defendants state that they ''are thoroughly familiar with all of the terms, provisions, conditions and requirements contained in said building loan agreement'' (R. p. 595).

Turning then to the covenants of the Principal set forth in that building loan agreement, we find the following (R. p. 568):

> ''and the Borrower'' (Principal, Central Park Properties, Inc.) ''agrees * * * to perform and comply with all and every of the covenants, terms and conditions herein and *in said bond and mortgage contained,*''

and the building loan agreement further specifies (R. p. 568) that ''Said loan shall be evidenced and secured by the bond of the Borrower'' and also (R. p. 569):

> ''Third: Said bond shall be conditioned for the repayment of the amounts advanced thereon on the 16th day of December, 1930; together with interest at the rate of six (6%) per centum per annum due and pay-

able on the 16th day of December, 1930, and quarter-annually thereafter and as hereinafter provided."

The building loan agreement further provides that interest on the full principal amount shall run from the date fixed for completion, whether or not the building be completed on that day (R. p. 570).

It follows, therefore, that when the defendants in their surety bond undertook to make good any default by the Principal

> "in performing any of the * * * covenants * * * in said building loan agreement set forth by the Principal to be kept and performed *up to and including the completion*"

of said building and the installation of the equipment, the defendants assumed a definite contract obligation to pay the interest which the Court has awarded, viz., interest on the principal of the loan from December 16, 1930 to October 1, 1931, the date of the "completion of the building."

Citations by the Circuit Court of Appeals to the effect that "in the absence of express contract to pay interest, interest as damages cannot be recovered apart from the principal of the debt", have no application to the present case because (1) as above shown, there was an express contract to guarantee interest up to and including the completion of and payment for said building, (2) the rule has no application to a suit such as this is, for damages by loss of interest on an investment;

Meyer v. *Haven,* 70 App. Div. 529
Wood v. *Joliet Gas Light Co.,* 111 Fed. 463
DeFord v. *Maryland Steel Co.,* 113 Fed. 72 (C. C. A. 4)
New York, etc. Mining Co. v. *Fraser,* 130 U. S. 611

See Sutherland Damages, Section 703, and (3) loss of interest was part of the damages within the contemplation of the parties (see III, *infra*).

As to insurance: The building loan agreement requires the principal to pay (R. p. 580-81):

> "fire, lightning and steam boiler explosion insurance, together with any other insurance deemed necessary by Lender" (Plaintiff).

As to taxes: The surety bond itself recites that the bond is to guarantee completion of the building on December 16, 1930, in strict accordance with the building loan agreement and plans and specifications, and also "free from all liens."

Also among the obligations of the Principal as set forth in the building loan agreement was the obligation that plaintiff's mortgage was to be "a valid first lien upon the premises" "free and clear of all liens and encumbrances" (R. p. 568).

Certainly the above obligations were breached by the nonpayment of taxes. How can a mortgage be a first lien, as defendants guaranteed this to be, unless taxes on the mortgaged property are paid?

Moreover, payment of taxes is also covered by the provisions of the building loan agreement at folio 1726 giving plaintiff, as Lender, the right to apply any part of any advance in payment of interest or taxes due and that the amounts so applied shall be deemed advanced to Central Park Properties, Inc., clearly show the principal was obligated to pay these items.

The building loan agreement certainly did contemplate a building which when completed was to be free and clear of taxes and was to be with proper insurance pending completion.

We believe it is obvious, moreover, that taxes and insurance premiums were necessary expenditures for the completion of the building; otherwise in the case of fire or sale for unpaid taxes, plaintiff would have had no building even after having completed it.

III.

Aside from the Express Provisions of the Bond Requiring Payment of Interest, Taxes and Insurance, Their Recovery as Damages Involves a Question of Fact as to What Was Contemplated by the Parties; and This Fact Supported by Evidence and Found by the District Court, Was Not Open to Review by the Circuit Court of Appeals.

This is a suit on a contract.

The rule is an old and familiar one that the measure of damages on a contract includes all such as may be reasonably supposed to have been in the contemplation of the parties. *Hadley* v. *Baxendale,* 9 Exch. 341, 354, 356, approved by this Court in *Howard* v. *Stillwell & Bierce Mfg. Co.,* 139 U. S. 199, 207.

> *The question of what damages were contemplated by the parties at the time the contract was made is a question of fact.*

That what damages were contemplated is a question of fact follows from the original case of *Hadley* v. *Baxendale,* (9 Exch. at 354-55), which describes it as a problem for the jury.

> "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." *

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*Quotation is from *Howard* v. *Stillwell & Bierce Mfg. Co.* (139 U. S. 199, 207).

Other courts also have uniformly treated the question as one of fact:

Delafield v. *Armsby Co.*, 131 App. Div. 572, 586, aff'd 199 N. Y. 518;
Holt Mfg. Co. v. *Thornton*, 136 Cal. 232, 68 Pac. 708;
McMahon v. *Field*, 7 Q. B. Div. 591.

The trial court in including interest, taxes and insurance in its measure of damages, therefore decided a question of fact as to what damages were contemplated by the parties. In reversing that finding, the Circuit Court of Appeals violated the well recognized rule that where both parties have moved for the direction of a verdict they are concluded by the court's findings on all issues of fact, and the decision is not open to review if there be any evidence to support it.

Beuttell v. *Magone*, 157 U. S. 154
Clapper v. *Gamble*, 28 F. (2d) 755, 758 (C. C. A. 8)
American etc. v. *Spielberg*, 262 F. 492
Williams v. *Vreeland*, 250 U. S. 295, 298.

So far from there being no evidence that loss of interest and accruing taxes and insurance were one of the contemplated damages from failure to complete on time, the defendant on the trial never disputed the fact. The documents themselves prove that such damages were contemplated, and that these possible losses were one of the reasons for requiring a bond of $3,000,000.

The Prudence Company is an investment Company. It was making a mortgage loan in installments, bearing 6% interest, and under a building loan agreement which required payment of taxes and insurance. The sureties were familiar with all the provisions of the building loan agreement (R. p. 595). Both the bond and the building loan agreement repeatedly emphasized the purpose to have the proposed building "fully completed and ready for occu-

pancy as a modern hotel *not later than the 16th day of December, 1930.*"

Obviously, the importance of the fixed date for completion was that plaintiff as mortgagee wished to be assured that on that date it would have a completed building to secure payment of interest on its investment, and taxes and insurance on the building.

The contract, moreover, was made in the light of the existing law under which (1) interest, taxes and insurance had been authoritatively referred to as one of the damages to a mortgagee to be contemplated by reason of delay in the completion of a building (*Kidd* v. *McCormick*, 83 N. Y. 391; *Trainor* v. *Aetna Casualty Co.*, 290 U. S. 47, 55) and (2) that loss of interest caused by another party's delay might be recovered as damages even though such defendant was not liable for the principal obligation (*Meyer* v. *Haven*, 70 App. Div. 529).

The ruling of the Circuit Court of Appeals that such damages were not contemplated appears, therefore, to be utterly untenable.

The parties must have had in mind also the many legal and accounting authorities which treat interest during the period of construction on the capital invested in the project, and taxes and insurance on the property during such period, as part of the cost of construction. This Court has held them to be part of the cost of construction in *Ohio Utilities Co.* v. *Commission*, 267 U. S. 359, 361-63.

See also:

Natural Gas Co. v. *Public Service Comm.*, 95 W. Va. 557, 573.

Horwath & Toth, Hotel Accounting (1928), page 284, where the authors state:

"The cost of a new hotel includes the contract price as adjusted by extras and allowances resulting from changes in plans and in specifications, architect's fees,

interest on borrowed money and real estate taxes during construction, and * * * insurance."

Under those authorities in fact, interest, taxes and insurance became part of the damages specifically agreed to be paid; for in addition to the provisions already quoted (*supra* pages 27-29) the surety bond contained an agreement by the surety for the payment of "the entire cost of erection, construction and completion of said building" (R. p. 596), which would include interest, taxes and insurance.

The amount of interest, taxes and insurance would increase as the project approached completion and the investment in it increased; therefore, as the parties obviously contemplated when the contract was made, they become an increasingly important element of damages.

Plaintiff has proved the total actual cost of completion, a form of evidence more accurate than, and preferable to, the uncertain alternative of experf estimates as to cost of completion or difference in value.

The plaintiff was not obligated to prove loss of rent during the period of incompletion. It never claimed loss of rent. If it had claimed and proved loss of rent the defendants would certainly have insisted that the damages be restricted to what the plaintiff has claimed, and the trial court actually allowed, namely, interest, taxes and insurance.

The loss by delay which is contemplated in the case of a mortgagee is not a loss of rent, but a loss of interest, together with damages by reason of taxes and insurance required to be paid for the period of delay, and not a "loss of profits". (See opinion, R. 884.)

The parties must have contemplated when the building loan agreement and surety bond were executed, that the building when erected would rent for more than enough to pay interest on the mortgage, and taxes, insurance premi-

ums and other carrying charges. Otherwise, (1) Central Park Properties would never have undertaken to erect the building, and (2) The Prudence Company would not have agreed to lend money on its security for its erection.

The defendants offered no evidence to show that this normal and inevitable belief that rental value would exceed interest, taxes and insurance was wrong, or that such rental value was in fact less than interest, taxes and insurance. Surely no court can properly purport to take judicial notice that the rental value of a modern apartment hotel, fronting on Central Park South, in New York City, would not in 1932 equal its carrying charges—especially to use such assumption as a basis for reversing a finding of the trial court.

The action of the Circuit Court of Appeals in reversing the District Court's decision as to what was in fact contemplated as damages, and in eliminating an item of damages which is clearly within the contemplation of the parties to a mortgagee's completion bond, involves a further departure from the *Kidd* and *Trainor* cases and from accepted law, and presents an issue of sufficient importance to justify the reviewing action of this Court.

IV.

Even Assuming, for the Purpose of Argument, That the Contract in This Case (The Surety Bond) Could be Orally Changed by the Parties Thereto, Nevertheless the Circuit Court of Appeals Has Confused the Contract Which it Says Was Changed.

There Is No Pretense in the Record That the Parties to the Surety Bond Ever Undertook or Attempted to Change the Provisions of the Surety Bond.

There is a fundamental fallacy in the Circuit Court of Appeals' finding of evidence "tending to show" parole waiver, altogether apart from the fact, discussed in the

next Point, that the principle which permits such waiver on certain occasions was misapplied in this case. The fallacy lies in the Court's confusion of the instrument which it is claimed was changed.

The omissions and substitutions which are the subject of the complaint herein, constituted a violation of the *building loan agreement.*

The contract on which the suit is brought is the *surety bond,* which guaranteed performance of the building loan agreement. It was the surety bond itself, *not* the building loan agreement, which provided that plaintiff should not be bound by any changes from the plans and specifications, unless (1) in writing, (2) approved by duly authorized officers of the plaintiff, and (3) specifying the particular items so released.

No evidence was introduced or offered that any change was made in the surety bond, orally or otherwise. That contract, therefore, still stands unchanged, and is just as binding today as it was the day it was signed.

There was a real purpose in placing the provision with respect to waiver in the surety bond and not in the building loan agreement. Courts and counsel are familiar with the fact that oral waivers and consents to variations are stock-defenses set up by sureties when called upon to make good under their bonds. It was intended to provide assurance against such a defense, so that with respect to the defendants' liability on this surety bond, no one could bind the plaintiff to any variances from the complicated plans and specifications (15 sheets of blue print plans and 34 leaflets of specifications), without complying with definite formalities. The necessity of such formalities in order to prevent confusion and uncertainty on a job of the size and complexity of this building—only one of 120 buildings which plaintiff had to watch—is apparent. It was because

of this that plaintiff required as a condition to making the building loan, that it have the surety's guaranty, in the bond itself, that no variances from the plans and specifications could be made or claimed to have been made without the protections afforded by the waiver clause.

The Circuit Court of Appeals has taken away this protection, and deprived plaintiff of a substantial right for which it expressly contracted. The failure of the Circuit Court of Appeals to consider or discuss the significance of the fact that the waiver restrictions were contained in the surety bond rather than simply in the building loan agreement, makes it important that this Court review and correct such decision, which involves an important question of general law that has been determined in a way clearly untenable.

V.

The Evidence, the Exclusion of Which Was Made a Basis of Reversal by the Circuit Court of Appeals, Did Not "Tend to Show" Any Waiver of the Plans and Specifications or Consent to Substitutions.

The Circuit Court of Appeals stated (R. 882-883):

> "Evidence was offered tending to show that the President of the Appellee consented to substitutions made, and it was excluded. * * * Such a parole waiver or consent would be legally effective * * * (citing cases) if the Appellee's President had authority to waive the requirement of a written waiver or consent. Excluding such evidence was prejudicial error."

The only evidence to which the opinion of the Circuit Court of Appeals is applicable is contained in the following passage from the cross-examination of Frank Grad, architect for the principal during the early stages of the building (R. p. 213):

"Q. At any time after you left the Lefcourt organization, or rather at any time after June, 1930, when you say your connection with this job ceased, and prior to December, 1930, did you have any talk with Mr. Waterman of The Prudence Company? A. Yes, I believe I had.

Q. And what was the nature of the talk that you had with him? A. I just told him that I was—I was to see him about another loan, to start with, and I told him that I had severed connections with the job and if anything goes wrong not to hold it against me because I am through.

Q. And didn't you tell him at that time about certain things which in your opinion were not in accordance with the plans and specifications?

Mr. Schenck: I object to this on the ground that it is irrelevant and not proper cross examination."

The sustaining of this objection is the one thread of error upon which a judgment for $781,694.56 has been reversed, and a new trial ordered.

Not only is there no evidence of any writing, nor is there any evidence that Mr. Waterman was authorized to waive variations from the plans and specifications, but also there did not purport to be any specific or particular items released.

Even an officer having general authority has been held not empowered to depart from requirements for written waiver in building specifications. Thus, in *Traitel Marble Company* v. *Brown Bros. Inc.*, 159 App. Div. 485, the defendant's Secretary-Treasurer, who also acted as its architect, was held not authorized to orally permit the substitution of one class of tile for another where the building contract provided that "no alterations shall be made in the work, except upon the written order of the architect."—this although such an officer has general authority under New York law.

In this instant case, there was affirmative evidence that the power to waive any provisions of the plans and specifications was vested in a special committee (R. pp. 136-37, 684-85). When specific officers have been charged with the joint duty of watching over the details of a particular job, the right of any other officer to overrule, without consultation, is excluded by every consideration of business efficiency or of common sense.

The doctrine of *Northern Assurance Company* v. *Grandbein*, 183 U. S. 308, 352 and *Beatty* v. *Guggenheim*, 225 N. Y. 380, that there can under certain circumstances be a parole waiver of written requirements for written waiver, is one of comparatively recent origin, developed to prevent forfeiture of insurance policies. Neither of the above cases, cited by the Circuit Court of Appeals in support of the doctrine, dealt with the details of a building contract, where there is peculiar necessity for the certainty which is afforded by specific written waivers.

In building contracts, the New York courts have repeatedly insisted upon strict compliance with provisions restricting the forms of authorization for variations from specifications or for extra work.

Kelly v. *St. Michael's R. C. Church*, 148 App. Div. 767, 773-5;

Molloy v. *Briarcliff Manor*, 145 App. Div. 483, 491;

Walsh v. *Howard & Childs*, 61 Misc. 328, 331;

Woodruff v. *Rochester & Pittsburgh R. R. Company*, 108 N. Y. 39.

Langley v. *Rouss*, 185 N. Y. 201, wherein the Court of Appeals stated:

"* * * *Where contracts including plans and specifications involve a great amount of detail*, and the merits of claims for alterations and extra work are dif-

ficult to determine and adjust after the work is completed, *a provision requiring the contractor to submit itemized estimates of the expense of proposed alterations or extra work and that the order of the architect therefor should be in writing, is reasonable and tends to a more definite understanding and avoids controversies.* The contractor is not required to make changes or perform extra work unless he first receives written authority therefor and the contract is, therefore, neither unreasonable nor severe and it should be enforced. An agent cannot enlarge his own powers by waiving the limitations thereon." (p. 206)

Moreover, there was not even any evidence offered in this case that the President purported to waive anything.

The most which can be said of the evidence which was excluded, is that a person formerly employed by the principal, who did not pretend at that time to represent any of the parties, undertook to make some oral statement to the President of The Prudence Company with respect to some unspecified changes from the plans and specifications or substitutions which he said the principal had already made in erecting the building.

No case has ever held that waiver can be proved without any request by or communication to the obligor.

No evidence was offered as to any of the specific changes which Mr. Grad may have mentioned. No inference can be drawn that any of them are included in the omissions and substitutions for which recovery was sought. Certain changes had admittedly been approved by the Committee (R. pp. 683-705) and plaintiff makes no claim with respect to those changes or omissions. There is no virtue or force in showing that Grad spoke of changes without showing that they were unapproved changes.

But the defect in this so-called testimony is more fundamental. Waiver of provisions of a written contract become

operative by way of estoppel. (*United Firemen's Ins. Co.* v. *Thomas,* 82 Fed. 406, 409). The notion of a waiver without any communication by or to the party obligated is unheard of. Certainly waiver must be the result of a transaction between the two parties to the contract. Or if the waiver be regarded as a subsequent oral agreement, it must be an agreement with the party to be relieved.

Remarks of a disgruntled ex-employee, or any other outsider, to the obligee, have never before been considered to prove, or even "tend to show" a waiver of contract rights by the obligee. The holding of waiver of contract provisions without any request therefor, or communication thereof to the party bound, so far departs from any accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The point has particular importance in this case because it was only the exclusion of this evidence which required a new trial under the opinion of the Circuit Court of Appeals. But for the totally erroneous ruling on the questions put to Grad, the Circuit Court of Appeals (even assuming for the purpose of argument that any error could be predicated upon the holding with respect to interest, taxes or insurance) should properly have modified or conditionally affirmed the decision of the lower court instead of directing a new trial on issues already fully litigated.

United States v. *Salmon,* 42 F. (2d) 353 (C. C. A. 5);

United States Potash Co. v. *McNutt,* 70 F. (2d) 126, 132 (C. C. A. 10);

Becker Bros. v. *United States,* 7 F. (2d) 3 (C. C. A. 2);

Board of Education v. *Maryland Casualty Co.,* 27 F. (2d) 20, 23 (C. C. A. 3).

Cf. Baltimore & Carolina Line v. *Redman.* 79 L. Ed. 944, as to the power of the reviewing court over a verdict.

A new trial of a case of this magnitude because of one question put to Mr. Grad—irrelevant, immaterial, and properly excluded—is a gross injustice, which this Court ought not permit to pass uncorrected.

Conclusion.

The petition for a writ of certiorari should be granted.

Dated, New York, July 23, 1936.

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(6683-C)